



Attorney's Docket No.: 10636-005001

DAC

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : David Castiel, et al. Art Unit : 2681
Serial No.: 09/658,215 Examiner : Kamran Afshar
Filed : September 8, 2000
Title : FIXED SATELLITE CONSTELLATION SYSTEM EMPLOYING NON-
GEOSTATIONARY SATELLITES IN SUB-GEOSYNCHRONOUS
ELLIPTICAL ORBITS WITH COMMON GROUND TRACKS

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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OFFICE OF PETITIONS

PETITION UNDER 37 CFR 1.137(b)

In timely response to the decision dated June 16, 2004 on the prior petition filed on April 2, 2004, Applicants request that this application be revived under 37 CFR 1.137(b) on the ground that the application became abandoned unintentionally and be accepted under 37 CFR 1.47(a). The entire delay for fulfilling the evidentiary showing under 37 CFR 1.47(a) was unintentional and the application should be revived for the reasons stated below and the evidence filed herewith.

Facts in connection with this renewed petition are summaries as follows.

(1) John Draim, one of the three joint inventors for this application, was provided with a combined power of attorney and declaration and a copy of the application as originally filed on September 8, 2000 after the filing.

CERTIFICATE OF MAILING BY FIRST CLASS MAIL

I hereby certify under 37 CFR §1.8(a) that this correspondence is being deposited with the United States Postal Service as first class mail with sufficient postage on the date indicated below and is addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

August 16, 2004

Date of Deposit:

Signature

R.P. Ippolito

Roxanne Ippolito

Typed or Printed Name of Person Signing Certificate

08/19/2004 CCHAU1 00000038 09658215
01 FC:2453 665.00 OP

Applicant : David Castiel, et al.
Serial No. : 09/658,215
Filed : September 8, 2000
Page : 2 of 3

Attorney's Docket No.: 10636-005001

(2) John Draim refused to sign the declaration required under 37 CFR 1.63 after repeated requests by the attorney of this application, Scott Harris.

(3) On June 21, 2004, Bing Ai, an associate of the attorney Scott Harris, sent to John Draim a package via the express mail by the U.S. Postal Service that contains a letter to John Draim, a combined power of attorney and declaration, an assignment, and a copy of the originally filed application of this case. The letter to John Draim requested John Draim to review the filed application and sign the enclosed combined power of attorney and declaration and the assignment. John Drain personally received the package on June 25, 2004. Under 37 CFR 1.47(a), a copy of the delivery receipt from the United States Postal Service dated June 25, 2004, a copy of the original express mail label, a copy of the tracking confirmation and a copy of the letter to John Draim dated June 21, 2004 are attached herewith to show that John Draim was presented with the originally filed application which included specification, claims, and drawings.

(3) As of today, August 18, 2004, the combined power of attorney and declaration mailed to John Draim in the above package on June 21, 2004 has not been returned with the requested signature by John Draim.

Therefore, it is respectfully submitted that the facts above sufficiently support that John Draim, once again, refused to sign the combined power attorney and declaration that was sent to him. As such, the requirements for the petition under 37 CFR 1.47(a) have been met and the petition should be granted.

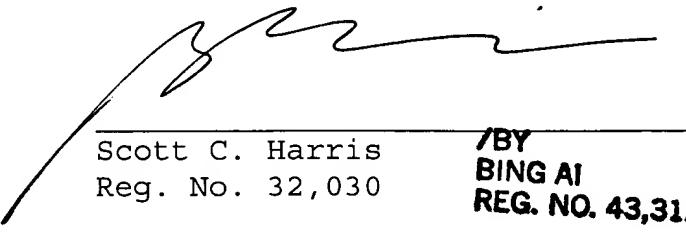
In addition, a check of \$665.00 is enclosed for the required fee for the petition to revive under 37 CFR 1.137(b) and applicants authorize the Patent Office to charge any

Applicant : David Castiel, et al.
Serial No. : 09/658,215
Filed : September 8, 2000
Page : 3 of 3

Attorney's Docket No.: 10636-005001

additional fees to deposit account No. 06-1050. Acceptance of this filing is respectfully requested. Upon acceptance of this filing, the application should be revived.

Respectfully submitted,



Scott C. Harris
Reg. No. 32,030

/BY
BING AI
REG. NO. 43,312

Fish & Richardson P.C.
PTO Customer No. 20985
12390 El Camino Real
San Diego, California 92130
Telephone: (858) 678-5070
Facsimile: (858) 678-5099

10425280.doc



**UNITED STATES
POSTAL SERVICE™**

Date: 06/25/2004

RECEIVED

AUG 23 2004

OFFICE OF PETITIONS

Fax Transmission To: BING AI
Fax Number: 858-678-5099

Dear BING AI:

The following is in response to your 06/23/2004 request for delivery information on your Express Mail item number EV367428593US. The delivery record shows that this item was delivered on 06/22/2004 at 11:47 AM in VIENNA, VA 22182 to J DRAIM. The scanned image of the recipient information is provided below.

Signature of Recipient:

Delivery Section


John D. Draim

Address of Recipient:

9310 Telfer Ct. 22182

Thank you for selecting the Postal Service for your mailing needs. If you require additional assistance, please contact your local Post Office or postal representative.

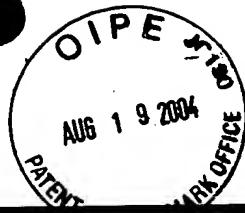
Sincerely,

United States Postal Service

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JUN 26 2004

**FISH & RICHARDSON, P.C.
SAN DIEGO**



Track & Confirm

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OFFICE OF PETITIONS

Track & Confirm

Enter label number:

Shipment Details

You entered EV36 7428 593U S

Your item was delivered at 11:47 am on June 22, 2004 in VIENNA, VA 22182. The item was signed for by J DRAIM.

Here is what happened earlier:

- ARRIVAL AT UNIT, June 22, 2004, 10:18 am, VIENNA, VA 22180
- ENROUTE, June 21, 2004, 7:46 pm, SAN DIEGO, CA 92137
- ACCEPTANCE, June 21, 2004, 7:23 pm, SAN DIEGO, CA 92110

Notification Options

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AUG 23 2004

OFFICE OF PETITIONS

 EV 367428593 US		EXPRESS MAIL UNITED STATES POSTAL SERVICE®	
Customer Copy Post Office To Addressee			
DELIVERY (POSTAL USE ONLY)			
ORIGIN (POSTAL USE ONLY)		Delivery Attempt	
PO ZIP Code 92110	Day of Delivery <input checked="" type="checkbox"/> Next <input type="checkbox"/> Second	Flat Rate Envelope <input checked="" type="checkbox"/>	Time <input type="checkbox"/> AM <input type="checkbox"/> PM
Date In 6/21/04	Mo. Day Year Mo. Day Year	Postage \$ 13.65	Employee Signature
Time In 10:22	Military <input type="checkbox"/> AM <input checked="" type="checkbox"/> PM	Return Receipt Fee	Delivery Attempt <input type="checkbox"/> AM <input checked="" type="checkbox"/> PM
Weight lbs. .75	Oz. 0.0	Intl Alpha Country Code USA	Time <input type="checkbox"/> AM <input checked="" type="checkbox"/> PM
No Delivery <input type="checkbox"/> Weekend <input type="checkbox"/> Holiday	Accepted Clerk Initials JK	COD Fee \$ 0.00	Employee Signature
TOTAL POSTAGE & FEES \$ 13.65		Delivery Date Mo. Day	
CUSTOMER USE ONLY METHOD OF PAYMENT: X960205 Express Mail Corporate Acct. No.		NO DELIVERY <input type="checkbox"/> Weekend <input type="checkbox"/> Holiday	
FROM: (PLEASE PRINT) FISH & RICHARDSON P.C. E12390 E1 Camino Real San Diego, CA 92130		TO: (PLEASE PRINT) John E. Drain 9310 Telfer Court Vienna, VA 22182-3438	
<small>Federal Agency Acct. No. or (Postal Service Acct. No.)</small>			
<small>WAIVER OF SIGNATURE (Domestic Only) Additional merchandise must be paid for in advance. If signature is requested, I wish delivery to be made without obtaining signature of addressee or addressee's agent. If delivery employee judges that article can be left in absence of addressee or addressee's agent, I authorize that delivery employee's signature constitutes valid proof of delivery.</small>			
<small>(NO DELIVERY) <input type="checkbox"/> Weekend <input type="checkbox"/> Holiday</small>			
<small>Customer Signature</small>			
<small>PRESS HARD. You are making 3 copies.</small>			
FOR PICKUP OR TRACKING CALL 1-800-222-1811 www.usps.com			
			



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Frederick P. Fish
1855-1930

W.K. Richardson
1859-1951

VIA EXPRESS MAIL & CERTIFIED MAIL

EV367428593US 7003 2260 0007 5998 3340

12390 El Camino Real
San Diego, California
92130

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June 21, 2004

John E. Draim
9310 Telfer Court
Vienna, VA 22182-3438

Re: FIXED SATELLITE CONSTELLATION SYSTEM EMPLOYING NON-
GEOSTATIONARY SATELLITES IN SUB-GEOSYNCHRONOUS ELLIPTICAL
ORBITS WITH COMMON GROUND TRACKS

Applicant: David Castiel, et al.
Application No.: 09/658,215
Filing Date: September 8, 2000
Country: United States
Our Ref.: 10636-005001

FR
BOSTON
DALLAS
DELAWARE
NEW YORK
SAN DIEGO
SILICON VALLEY
TWIN CITIES
WASHINGTON, DC

Dear Mr. Draim:

We understand that you previously have received a copy of the filed application for this case. In addition, the Combined Declaration and Power of Attorney along with the Assignment document for the above referenced case was sent to you on September 28, 2001. However, we have not received the signed documents from you.

Enclosed please find a copy of the application as filed and another set of the formal papers (Combined Declaration and Power of Attorney and Assignment) for your review and signature. Please review and return these documents to our office as soon as possible for a timely filing with the US Patent and Trademark Office.

If you have any questions feel free to contact me.

Very truly yours,

Bing Ai

BXA/rpi

10407522.doc

EV367428593US

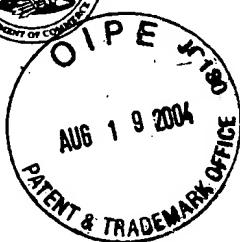
10636-005001

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ALEXANDRIA, VA 22313-1450
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FISH & RICHARDSON, PC
12390 EL CAMINO REAL
SAN DIEGO CA 92130-2081

In re Application of
Castiel, et al
Application No. 09/658,215
Filed: 8 September, 2000
Attorney Docket No.: 10636-005001

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JUN 18 2004

Paper No: 15

FISH & RICHARDSON, P.C.
SAN DIEGO

COPY MAILED

JUN 16 2004

OFFICE OF PETITIONS

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AUG 23 2004

OFFICE OF PETITIONS ON PETITION

This is a decision on the petition filed on 2 April, 2004, requesting withdrawal of the holding of abandonment (as to a Communication alerting Petitioner to the abandoned status of the application) mailed by the Office on 21 May, 2004, and considered under 37 C.F.R. §1.181.

For the reasons set forth below, the petition as considered under 37 C.F.R. §1.181 is
DISMISSED.

NOTES:

- (1) Any petition (and fee) for reconsideration of this decision under 37 C.F.R. §1.181, or 37 C.F.R. §1.137(a) (as to unavoidable delay) or an alternative request for relief under 37 C.F.R. §1.137(b) (as to unintentional delay) must be submitted within two (2) months from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(a)"; and/or "Petition under 37 C.F.R. §1.137(b)";
- (2) Thereafter, there will be no further reconsideration of this matter.

BACKGROUND

The record reflects that:

Docketed By Billing Secretary	
Due Date:	7-16-04
Deadline:	8-16-04
Initials:	im

DOCKETED BY PRACTICE SYSTEMS
ACTION CODE: <u>Unintentional Abd</u>
BASE DATE: <u>6-16-04</u>
DUE DATE: <u>7-16-04</u>
DEADLINE: <u>8-16-04</u>
INITIALS: <u>im</u>
RECORD:

- the Office mailed a Notice of Missing Parts on 27 October, 2000, and the 6 March, 2001, and 20 September, 2001, petitions seeking status under 37 C.F.R. §1.47 were dismissed by the Office on 9 July, 2001, and 2 October, 2001, respectively (copy of 2 October, 2001, decision enclosed);
- although Petitioner failed to timely and properly address the dismissal of 2 October, 2001, on or before Monday, 3 December, 2001—and thus the application was deemed abandoned after midnight 2 December, 2001--the Examiner nonetheless examined the application and mailed a Notice of Allowance on 7 October, 2003;
- during review prior to publication, the abandoned status of the application was discovered by the Office.
- a Communication was mailed by the Office to Petitioner on 21 May, 2004, and indicated that Petitioner had failed to reply timely and properly to the dismissal of 2 October, 2001;
- nonetheless, Petitioner argues in his petition about some unidentified paper dated 1 September, 2000 (sic)—a date which is not at issue in this regard.
- Petitioner has not as of this writing properly replied to the 2 October, 2001, dismissal, and the application remains abandoned—therefore, the “reply” requirement for revival remains a grantable petition under 37 C.F.R. §1.47 or a petition evidencing joinder.

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).¹

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority. The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for

¹ 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

the reply now to be accepted on petition.²

Delays in responding properly raise the question whether delays are unavoidable.³ Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).⁴ And the Petitioner must be diligent in attending to the matter.⁵ Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁶ And petitions calling upon the authority of the Commissioner to act, such as that under 37 C.F.R. §1.181,⁷ require diligence as to their filing—i.e., the petition must be filed within two months of

² Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

³ See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

⁴ See: In re Application of G, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

⁵ See: Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office supra.

⁶ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

⁷ The regulations at 37 C.F.R. §1.181 provide:

§ 1.181 Petition to the Commissioner.

(a) Petition may be taken to the Commissioner:

(1) From any action or requirement of any examiner in the *ex parte* prosecution of an application, or in the *ex parte* or *inter partes* prosecution of a reexamination proceeding which is not subject to appeal to the Board of Patent Appeals and Interferences or to the court;

(2) In cases in which a statute or the rules specify that the matter is to be determined directly by or reviewed by the Commissioner; and

(3) To invoke the supervisory authority of the Commissioner in appropriate circumstances. For petitions in interferences, see § 1.644.

(b) Any such petition must contain a statement of the facts involved and the point or points to be reviewed and the action requested. Briefs or memoranda, if any, in support thereof should accompany or be embodied in the petition; and where facts are to be proven, the proof in the form of affidavits or declarations (and exhibits, if any) must accompany the petition.

(c) When a petition is taken from an action or requirement of an examiner in the *ex parte* prosecution of an application, or in the *ex parte* or *inter partes* prosecution of a reexamination proceeding, it may be required that there have been a proper request for reconsideration (§ 1.111) and a repeated action by the examiner. The examiner may be directed by the Commissioner to furnish a written statement, within a specified time, setting forth the reasons for his or her decision upon the matters averred in the petition, supplying a copy to the petitioner.

(d) Where a fee is required for a petition to the Commissioner the appropriate section of this part will so indicate. If any required fee does not accompany the petition, the petition will be dismissed.

(e) Oral hearing will not be granted except when considered necessary by the Commissioner.

(f) The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings. Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable.

(g) The Commissioner may delegate to appropriate Patent and Trademark Office officials the determination of petitions.

[24 Fed. Reg. 10332, Dec. 22, 1959; 34 Fed. Reg. 18857, Nov. 26, 1969; paras. (d) and (g), 47 Fed. Reg. 41278, Sept. 17, 1982, effective Oct. 1, 1982; para. (a), 49 Fed. Reg. 48416, Dec. 12, 1984, effective Feb. 11, 1985; para. (f) revised, 65 Fed. Reg. 54604, Sept. 8, 2000, effective Nov. 7, 2000; paras. (a) and (c) revised, 65 Fed. Reg. 76756, Dec. 7, 2000, effective Feb. 5, 2001]

the action complained of.

Allegations as to the Request to Withdraw
the Holding of Abandonment

The courts have determined the construct for properly supporting a petition seeking withdrawal of a holding of abandonment.⁸

Petitioner fails to satisfy his burden under 37 C.F.R. §1.181

CONCLUSION

Because Petitioner failed to satisfy the burdens set forth in Delgar v. Schulyer, the petition under 37 C.F.R. §1.181 must be and hereby is dismissed.

ALTERNATIVE VENUE

It appears that Petitioner is unable to make a showing surpassing that tendered heretofore, and, therefore, Petitioner's only alternative to irretrievable abandonment likely is to file a petition and fee as set forth at NOTE 1, above at page 1, under 37 C.F.R. §1.137(b), and state therein that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional."

Thus, Petitioner may wish to supplement her petition to plead alternatively under 37 C.F.R. §1.137(b) wherein the "showing" burden is much less onerous.

Petitioner is cautioned that failure to submit such a petition 37 C.F.R. §1.137(b) timely may be viewed as intentional delay and an absolute bar to revival.

Further correspondence with respect to this matter should be addressed as follows:

By mail: (Effective 1 May, 2003)⁹
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

⁸ See: Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971).

⁹ To determine the appropriate addresses for other subject-specific correspondence, refer to the USPTO Web site at www.uspto.gov.

By FAX: (703) 872-9306 (IFW Formal Filings)
ATTN.: Office of Petitions

By hand: Customer Service Window
Lobby/Room 1B03
Crystal Plaza Two
2011 South Clark Place
Arlington, VA 22202

Telephone inquiries concerning this decision may be directed to the undersigned at (703) 305-9199.



John J. Gillon, Jr.
Senior Attorney
Office of Petitions

Encl.: Copy of Decision of 2 October, 2001



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AUG 23 2004

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UNITED STATES PATENT AND TRADEMARK OFFICE
WASHINGTON, D.C. 20231
www.uspto.gov

Paper No. 8

FISH & RICHARDSON, PC
4350 LA JOLLA VILLAGE DRIVE
SUITE 500
SAN DIEGO, CA 92122

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OCT 02 2001

OFFICE OF PETITIONS

In re Application of
Castiel, et al. :
Application No. 09/658,215 :
Filed: September 8, 2000 :
Attorney Docket No. 10636/005/01 :
For: FIXED SATELLITE CONSTELLATION :
SYSTEM EMPLOYING NON-GEOSTATIONARY :
SATELLITES IN SUB-GEOSYNCHRONOUS :
ELLIPTICAL ORBITS WITH COMMON :
GROUND TRACKS :
:

DECISION REFUSING STATUS
UNDER 37 CFR 1.47(a)

This is in response to the renewed petition, filed September 20, 2001 under 37 CFR 1.47(a).

The petition is DISMISSED.

Rule 47 applicant is given ONE MONTH from the mailing date of this decision to reply, correcting the below-noted deficiencies. Any reply should be entitled "Request for Reconsideration of Petition Under 37 CFR 1.47(a)," and should only address the deficiencies noted below, except that the reply may include an oath or declaration executed by the non-signing inventor. Failure to respond will result in abandonment of the application. Any extensions of time will be governed by 37 CFR 1.136(a).

The above-identified applicant was filed September 8, 2000 without an executed oath or declaration and named David Castiel, Jack Anderson, and John E. Draine as joint inventors.

Accordingly, on October 27, 2000, a "Notice to File Missing Parts of Application" was mailed, requiring an executed oath or declaration, and a surcharge for its late filing, along with the required filing fees due in connection with the application. In response, a petition under 37 CFR 1.47(a) was filed on March 6, 2001 and dismissed July 9, 2001.

A grantable petition under 37 CFR 1.47(a) requires: (1) proof that the non-signing inventor cannot be reached or refuses to sign the oath or declaration after having been presented with the application papers (specification, claims and drawings); (2) an acceptable oath or declaration in compliance with 35 USC 115 and 116; (3) the petition fee; and (4) a statement of the last known address of the non-signing inventor.

The instant petition lacks item (1) referenced above. The petition lacks any supporting evidence that the non-signing inventor cannot be reached, was ever presented with a copy of the application papers (specification, claims and drawings), or, having been presented with the application papers, refused to

Application No. 09/658,215

sign the oath or declaration. Proof of the pertinent events should be made by someone having first hand knowledge of the events in the form of an affidavit or declaration. In particular, the declaration or affidavit must set forth the manner in which the application papers were presented to the non-signing inventor. Petitioner should include copies of dated cover letters and/or mailing receipts as evidence that the non-signing inventor was presented with a copy of the application papers or having been presented with the application papers, refused to sign the oath or declaration. If oral refusals were made by the non-signing inventor, that fact along with the time and place of the refusal must be stated in an affidavit or declaration signed by the person to whom the refusals were made. Petitioner's attention is directed to MPEP 409.03(d) for further information on the presumptive evidence required for accordance of status under 37 CFR 1.47.

Petitioner has failed to present any evidence to establish that the non-signing inventor ever received a copy of the application papers (specification, claims, and drawings). The letter dated August 28, 2001 and addressed to the non-signing inventor indicates that the non-signing inventor was presented with a combined declaration and power of attorney and an assignment.

Any renewed petition must be accompanied by evidence that the non-signing inventor has been presented with a copy of the application papers (specification, claims, and drawings).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents
 Box DAC
 Washington, D.C. 20231

By FAX: (703) 308-6916
 Attn: Office of Petitions

By hand: Crystal Plaza Four, Suite 3C23
 2201 S. Clark Place
 Arlington, VA

Telephone inquiries related to this decision may be directed to Petitions Attorney Alesia M. Brown at (703) 305-0310.


Beverly M. Flanagan
Supervisory Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy